UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TESORO REFINING AND MARKETING CO. [1]

and Cases 18–CA–19615
18–CA–19644

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 10[2]

David Biggar and Abby Schneider, Esqs.
for the General Counsel.
Bruce Fickman and Mariana Padias, Esqs. (United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union) of Pittsburgh, Pennsylvania
for the Charging Party.
William Dritsas and Joshua Ditelberg, Esqs, (Seyfarth Shaw, LLP)
of San Francisco, California for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Mandan, North Dakota on November 15–16, 2011. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 (the Union or Local 10) filed the charge in 18–CA–19615 on November 23, 2010, and on January 3, 2011, filed a charge in 18–CA–19644. Both charges indicate that Local 10 is affiliated with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the International Union).The Acting General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on October 4, 2011.

[1] The collective-bargaining agreement in effect at the time of the hearing (GC Exh. 8) indicates that the name of the Respondent is Tesoro Refining and Marketing Co. and I have amended the case caption accordingly.

[2] Because United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 is the Charging Party, I have amended the case caption to reflect that fact.

The complaint alleges that since about August 5, 2010, the Respondent has refused to bargain with the Union regarding the Respondent's announced intention to implement certain changes in unit employee benefits, including the thrift 401(k), pension, medical, educational assistance and group life insurance plans, and retiree medical, dental and life insurance plans for current unit employees in violation of Section 8(a) (5) and (1) of the Act. The complaint further alleges that on or about January 1, 2011, the Respondent unilaterally implemented new employee benefits in the subjects set forth above.

The Respondent's answer denied the material allegations in the complaint. On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent, I make the following

Findings of Fact

I. JURISDICTION

The Respondent, a corporation, is engaged in the refining of petroleum products at its facility in Mandan, North Dakota, where it annually sells products valued in excess of $50,000 which were shipped to locations outside the state of North Dakota. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[3] At the hearing, the Acting General Counsel moved to consolidate the instant case with the consolidated complaint that had issued against the Respondent on November 10, 2011, in Cases 21–CA–39591 and 21–CA–39647 alleging that the Respondent had unilaterally implemented benefit changes in its Southern California bargaining unit in violation of Section 8(a) (5) and (1) of the Act. The Acting General Counsel argued that the cases involve the same parties and arose from a dispute over the Respondent's alleged unilateral changes to its national benefit plans and thus should be consolidated for trial for reasons of administrative and judicial economy and to avoid the possibility of inconsistent results. The Charging Party joined in the Acting General Counsel's motion. The Respondent opposed the motion arguing that the circumstances surrounding the individual cases were sufficiently distinct so that consolidation is not appropriate.

I denied the motion to consolidate at the hearing. In reaching my decision, I applied the test set forth by the Board in *Service Employees Local 87 (Cressleigh Management)* 324 NLRB 774 (1997), which indicates that an administrative law judge has discretion to determine whether consolidation is warranted, considering such matters as whether issues in the first case would have to be relitigated and the likelihood of delay if consolidation was granted. Applying these factors, I determined that consolidation is not warranted. I noted that the complaint had just issued in Case 21–CA–39591 et al. and that the decision in the instant case would be substantially delayed by the time it would take to litigate the issues in that case. The cases were filed by different local unions and each complaint alleges a separate appropriate unit. While there may be some common issues, I determined there are sufficient differences so that it is more appropriate to litigate the instant case and issue a timely decision rather than incur the substantial delay that would inevitably result from consolidation.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent operates several petroleum refineries throughout the United States, including the facility at issue in Mandan, North Dakota. The Respondent is a party to a collective-bargaining agreement with Local 10 that was effective by its terms from February 1, 2009 through January 31, 2012. (GC Exh. 8) This agreement applies to the following appropriate contractual unit:

> All operating and maintenance employees employed by the refining & engineering department of Tesoro Refining and Marketing Co. at its Mandan, North Dakota refinery excluding all clerical, confidential and professional employees, watchmen and guards, employees of the Tesoro pipeline and supervisors, as defined in the Act.

There are approximately 150 unit employees. The Mandan facility also employs approximately 80 to 100 unrepresented employees. Leif Peterson was the human resources director at the Mandan facility from April 1989 until May 2011. From May 2011, until his retirement on July 11, 2011, Peterson worked at the Respondent's corporate headquarters in San Antonio, Texas. Javier Montoya has been the president of Local 10 for approximately 2 years. Prior that he was vice president of Local 10 for approximately 10 years. He is employed at the Mandan facility as a process operator and has worked there for approximately 20 years.

The Respondent's Mandan facility has been owned by several entities since it was built by the Standard Oil Co. in the early 1950s and has had a long history of collective bargaining. The first collective-bargaining agreement at the facility was entered into in 1955 between Standard Oil and the International Union of Operating Engineers, AFL, Local 725. At a time that is not indicated in the record the Mandan facility was transferred from Standard Oil to the Amoco Oil Co. and the Oil, Chemical & Atomic Workers International Union, Local 6-10 (OCAW, Local 6-10) became the representative of the employees at the facility. According to Peterson, from 1989 to 1999 the Mandan facility was owned by Amoco. OCAW, Local 6-10 and Amoco were parties to a collective-bargaining agreement from February 1, 1996 through January 31, 1999. (GC Exh. 3). On November 19, 1997, Amoco and OCAW, Local 6-10 entered into a contract extension through January 2, 2002. At the same time the parties also executed a letter of understanding regarding successorship (GC Exh. 4). Pursuant to the terms of the successorship agreement, Amoco agreed that it would include in any sales agreement regarding the facility the requirement that the successor employer recognize the union and adopt the collective-bargaining agreement. The successorship agreement further indicated that while a successor would not be required to continue the existing employee benefits, it would be required to establish "reasonably comparable Benefit Plans in the aggregate". In approximately 1998, Amoco merged with British Petroleum to form BP and that entity operated the facility until 2001. In approximately 1999 OCAW merged with the Paper, Allied, Industrial Chemical Energy Workers International Union (PACE).

In 2001 the Respondent purchased the Mandan facility from BP. The Respondent and PACE, Local 7-10 entered into a collective-bargaining agreement effective from February 1,

2002, through January 31, 2006 (GC Exh. 3). Article 12 of the agreement is entitled "Benefits Plans" and provides that "Benefit Plans of the Company . . . . shall not in any instance be or become a part of this agreement." Thereafter, the Respondent and PACE, Local 7-10, bargained regarding the benefits of the employees in the Mandan unit. On August 28, 2003, the Respondent and PACE, Local 7-10 executed a "Memorandum of Agreement-Benefits" (MOA) reflecting the parties' agreement regarding the benefits of unit employees (GC Exh. 5). The MOA states that the agreement "does not alter the rights and obligations both Tesoro and PACE have under the Parties' Collective Bargaining Agreement and the Benefit Plans referred to herein." The 2003 MOA was signed for the Respondent by Peterson and the then president of Local 10 and Montoya, who was then the vice president of Local 10. Historically, the Mandan facility had always been subject to an employer's national employee benefit plans and this agreement did not change that practice. Thus, the unit employees at the Mandan facility were covered by the Respondent's national benefit plans.

On May 23–24, 2005, representatives of the Respondent, including Earl Borths, the Respondent's director of labor relations, met with various union representatives from the Respondent's facilities to inform them of upcoming benefit changes. According to Borths' uncontradicted testimony, he told the union representatives that the benefit changes were companywide and would affect all of the employees. Borths testified that he stated that the Respondent had the right to make such changes under the plans but that "we also respect the labor agreements and we will follow any contractual language that we have to implement these changes." (Tr. 234–235). According to Borths, Montoya, who at the time was the president of the Tesoro council, stated that he understood the Respondent could make such changes and while the Union did not agree with all of them, the Union appreciated the advance notice. The changes were implemented without a challenge from the Union.

In 2005 PACE merged with the United Steelworkers of America. On May 5, 2005, the Respondent and the United Steelworkers Local 10 entered into an agreement extending the 2002 to 2006 collective-bargaining agreement through January 31, 2009. (GC Exh. 7). Thereafter, as noted above, the parties entered into the collective-bargaining agreement which was effective by its terms through January 31, 2012.

The record establishes that historically negotiations in the petroleum industry are somewhat complex and involve an amalgam of national and local level negotiations. At the national level the International Union will bargain with the lead employer (formerly this was often Amoco but at present it is typically Shell Oil Co.) and come to an agreement on terms and conditions of employment that will be applicable to petroleum refineries nationwide. The next step is that the national agreement is then taken by the various employers, including the Respondent, to the local level where bargaining occurs over issues that are specific to the individual facility. While the Respondent and Local 10 do not substantively bargain over the national issues, they must agree to them and also reach agreement on local issues in order to finalize a contract. An agreement reached at the local level cannot conflict with the terms of the national agreement. As noted above, the agreement at the Mandan facility indicates it is between Local 10 and the Respondent. The Mandan facility has always been subject to the Respondent's national employee benefit plans and has never had a benefit plan that applied only to the employees at that facility.

The Changes to the Benefit Plans

On July 26, 2010, Peterson called Montoya and informed him that the Respondent would be making changes to the benefit plans of the employees at the Mandan facility. On July 28, 2010, the Respondent's CEO, Greg Goff, sent an email to the employees at all of the Respondent's facilities, including the Mandan facility, indicating that the Respondent had developed a plan to meet budgetary goals which would include changes to the existing 401(k) thrift plan and pension, medical, and group life insurance plans (GC Exh. 9). The email indicated the plan changes were to become effective on January 1, 2011. The email also stated that "[b]enefit changes for union represented employees will be made in accordance with the Plan documents and provisions of the applicable collective bargaining agreement."

On July 29, Peterson met with the union committee and gave Montoya a letter (GC Exh. 10) indicating that the Respondent intended to implement certain changes to employee benefits and included a summary of the proposed changes.[4] The letter indicated "if you wish to discuss this matter, please contact me no later than August 11, 2010 in order to set a mutually agreeable date for a meeting." Montoya told Peterson that the Respondent needed to negotiate these benefit changes with the Union. Peterson replied that the Respondent was under no obligation to negotiate regarding this matter in accordance with article 12 of the contract.

On August 5, 2010, Kent Morrell, the Union's recording secretary, sent a letter to Peterson (GC Exh. 11) indicating the following:

> The Union is in receipt of your letter dated July 28 in which the company outlines changes it intends to make to United Steelworker represented employees benefits. As the exclusive representative of these employees the Union is making a demand to bargain any such changes.

[4] The changes were listed as follows:

1. Transition the current Tesoro Retirement Plan to a "Cash Balance" Plans for service or an after 2010. Change vesting service requirement from 5 years to 3 years.
2. Thrift Plan 401(k)-Limit the maximum dollar-for-dollar match to 6% of eligible pay. Exclude bonus and overtime (other than included in base pay) from eligible matching pay.
3. Eliminate the medical waive credit.
4. Decouple VSP vision from medical benefit participation. VSP vision benefit will be made available as a "stand alone" benefit with an 80/20 premium cost split.
5. Eliminate the employee portion of the life insurance contribution for group life-benefit to be paid one hundred percent by the Company.
6. Implement "Earn As-You-Go." vacation.
7. Reduce life insurance coverage for employees retiring prior to December 31, 2010, or earlier to $10,000. Coverage will be eliminated, effective January 1, 2016.
8. Eliminate life insurance as a benefit option for those who retire after January 1, 2011.
9. Underwrite post-retirement medical premiums based on "retiree only" experience.
10. Eliminate post-retirement dental insurance January 1, 2011.
11 Eliminate post-65 medical insurance as of January 1, 2014.

> I am sending this letter on behalf of United Steelworker represented employees at the Tesoro Mandan Refinery bargaining units.
>
> The Union will also be sending the company a written request for additional information regarding the proposed benefit changes. We would like to schedule meetings following the submittal of our information request.

At a union-management meeting held on August 11, 2010, the Respondent acknowledged that it received the Union's August 5 letter demanding bargaining over the benefit plan changes.[5]

On August 18, 2010, Peterson gave Montoya a letter (GC Exh. 12) in which the Respondent again acknowledged receipt of the Union's August 5 letter. Peterson's letter also indicated:

> The Company's planned benefit changes are consistent with its rights under the Plans to make such changes, as is contemplated by our collective-bargaining agreement.
>
> Accordingly, while fully reserving and without prejudice to our contractual rights to undertake its planned changes, the Company is willing to discuss the benefit changes at a mutually convenient time. I will contact you to set up a meeting for that purpose.

On August 20, 2010, the Union submitted an information request to the Respondent seeking a substantial amount of information regarding the comparative costs of the existing plans and the Respondent's proposed changes. In its request the Union indicated it was seeking such information in order to have sufficient information to bargain on behalf of its members and requested that the information be submitted by October 1, 2010 (GC Exh. 14). On September 9, 2010, the Union submitted a second request for information asking for copies of the full plan descriptions for both the current and proposed plans (GC Exh. 15). This letter also asked the information to be submitted by October 1, 2010.

On September 1, 2010, Peterson and other Respondent representatives met with the union committee and showed them a power point presentation that the Respondent planned to show to employees later that day regarding the proposed benefit changes. (GC Exh. 13)[6] Montoya again told Peterson that the Respondent needed to negotiate the benefit changes with the Union. Peterson replied by again indicating that the Respondent was going to apply the provisions of article 12 of the contract (Tr. 48–49).[7] Later that day the Respondent representatives showed the

[5] Each month the Respondent and the Union have what they refer to as a "union-management" meeting to discuss a variety of matters relating to unit employees.

[6] Although the power point presentation itself is dated August 10, 2010, the Union's minutes of the December 13, 2010 union-management meeting (GC Exh. 20) establish this meeting was held at the Mandan facility on September 1, 2010.

[7] I credit Montoya's uncontroverted testimony on this point as I found him to be a credible witness in all respects.

power point presentation at a "town hall" meeting open to both the represented and unrepresented employees at the Mandan facility. [8]

While, on their face, some of the Respondents proposed changes would be beneficial to employees, several others clearly would not be beneficial. In this connection, the power point presentation indicated that the changes would mean a "Greater Shared Responsibility for Benefits" by employees (GC Exh. 13, at p. 23). The power point presentation also indicated that the "reduced pension/401(k) benefits" meant that "[m]ore personal savings are necessary" and that "Employees will be required to cover more expenses" with regard to health insurance.

On September 28, 2010, the Respondent informed the Union at a union-management meeting that the Respondent would not implement the proposed change in vacation policy (R. Exh. 19). According to Peterson's uncontroverted testimony, at the meeting held with the union committee on September 1, prior to the town hall meeting, the Union had objected to the change in vacation policy. That Respondent's representatives reported this objection to the Respondent's headquarters in San Antonio and a decision was made to delay the change in vacation policy until the following year (Tr. 122).

On September 30, the Respondent provided the summary plan descriptions of employee benefits to the Union pursuant to its information request. These documents total approximately 1100 pages.[9] When Montoya received the documents he submitted them to the International Union's benefit expert, Deborah Edwards, for her review. Edwards was assisting Local 10 in this matter.

On October 22, 2010, Local 10 Vice President Marcus Vogel sent an email to Peterson (GC Exh. 16) indicating the following:

> In response to your letter dated August 18, 2010 to USW Local 10, we are not asking to discuss the changes in the benefit plan we are asking to bargain over these issues. If Management is in fact refusing our demand to bargain, we are asking on what basis this refusal is based on.

On the October 26, 2010 Peterson replied by email indicating:

> Management is prepared to meet and discuss benefit plan changes with the Union at mutually agreeable times and locations.

On December 6, Morrell sent an email to Peterson (GC Exh. 17) which stated:

[8] The Union instructed unit employees not to attend the town hall meeting and few, if any, did so.

[9] Each of the plans contains reservation of rights language. For example, the Respondent's retirement plan indicates at page 34 of an 83 page document the following "Tesoro expects and intends to continue the employee benefits described in this SPD indefinitely, but reserves the right to amend or discontinue any or all parts at any time." (R. Exh. 16, GC Exh. 24).

> The Union is asking for confirmation of the company stand on negotiating the benefits changes. You gave Javier and I letter, and you also emailed saying the company was willing to "discuss" the benefits changes, but is not willing to negotiate with the Union. Is this correct? We would like to clarify and confirm where the Company stands with us right now.

Peterson responded by email the same day indicating:

> In response to your question and to clarify my email of October 22 to Marcus Vogel. The Company is following and prepared to follow Article 12 of the Agreement, including the procedures of Article 2, Sections 1-7 referenced therein.

At a union management meeting held on December 13, 2010, after reviewing a timeline of events regarding the benefit changes, Peterson read a statement indicating "We are willing to consider any proposals the Union offers." (GC Exh. 20). The Union asked the Respondent to put its position in writing and the Respondent's representatives indicated they would consider the Union's request.

On December 15, 2010, Montoya sent Peterson a letter (GC Exh. 21) indicating:

> This letter is in response to your comments to the union on December 13 that the company is willing to consider any proposals the union offers on the company's announced benefit changes. When will the company provide the union with a response to the union's pending information request on the announced benefit changes? The union needs this information in order to bargain intelligently on these issues. Following a review of the company's response to our pending information request, we will provide the company with our proposed dates for bargaining over the company's announced benefit changes.

On the same date, Peterson replied by a letter (GC Exh. 22) indicating:

> Without waiving or compromising the Company's rights under the Collective Bargaining Agreement, as we said in our December 13 meeting, the Company's willing to consider any proposal regarding benefits the Union may decide to make.
>
> On December 14 both the Union and Company signed Confidentiality Agreement regarding cost analysis and cost projection data regarding the benefit changes.
>
> On December 15, 2010 you presented me with a letter asking when the Company will provide the Union with a response to the information request covered by the Confidentially Agreement we signed yesterday, December 14.[10]

[10] The parties had been negotiating the terms of a confidentiality agreement regarding the Union's information request regarding cost data since some time in October 2010. (R. Exh.23)

> Javier, please find attached the cost analysis and cost projection data covered by the agreement we signed yesterday.

After receiving the cost information from the Respondent on December 15, the Union sent the information to Edwards. During the pay period beginning on December 19, 2010, and ending on January 1, 2011, the Respondent implemented the proposed change in the 401(k) thrift plan by reducing its matching contribution from 7 percent to 6 percent. (GC Exh. 23; Tr. 66.) The remaining proposed changes to the plans were implemented on January 1, 2011.

Analysis

The employee benefits that the Respondent indicated it would be changing in Goff's July 28, 2010 email and Peterson's July 29, 2010 letter to the Union constitute mandatory subjects of bargaining within the meaning of Section 8(d) of the Act. Specifically, the health insurance of current bargaining unit employees is a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736, 746 (1962); *E. I. Du Pont De Nemours, Louisville Works*, 355 NLRB 1098 (2010); *Amoco Chemical Co*., 328 NLRB 1220 (1999), enf. denied 217 F.3d 869 (2000). The retirement benefits of current employees constitute a mandatory subject of bargaining. *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1971) *Amoco Chemical Co*., supra at 221, fn. 3. Finally, 401(k) plans, *Convergence Communications*, 339 NLRB 408, 412 (2003); life insurance, *Borden, Inc*., 196 NLRB 1170, 1174–1175 (1972); and paid vacations, *Jimmy-Richard Co. Inc*., 210 NLRB 802, 808 (1974), enfd. 527 F. 2d 803 (D.C. Cir. 1975) have also been held to be mandatory subjects of bargaining.

The fact that the Respondent's past practice is to provide uniform employee benefits for all of its employees on a companywide basis does not negate its obligation to bargain, on request, on a unit by unit basis regarding those employees, such as those at its Mandan facility, who are represented by a labor organization. *Larry Geweke Ford*, 344 NLRB 628, fn. 1 (2005); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F. 3d 859 (8th Cir. 2002).

It is well settled that an employer violates Section 8(a) (5) and (1) of the Act when it unilaterally institutes a change to a mandatory subject of bargaining prior to reaching a lawful impasse with the bargaining representative. *NLRB v. Katz*, supra at 743; *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Mid-Continent Concrete*, supra. In the instant case, the evidence is clear that the Respondent unilaterally implemented its planned changes to employee benefit programs on or about January 1, 2011. The Respondent has raised several defenses to the claim of the Acting General Counsel that such conduct violated Section 8(a)(5) and (1) of the Act, which will be addressed here.

Whether the Parties' Agreements and Bargaining History Establishes a Waiver of the Union's Right to Bargain Over the Changes

The primary contention of the Respondent is that the parties' agreements (the collective bargaining agreement and the 2003 MOA) and the bargaining history at the Mandan facility establish that the Union waived its right to bargain over the plan changes that were implemented. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Court expressly reaffirmed the Board's long-standing policy that a waiver of a statutory right must be clear and unmistakable. In

Provena St. Joseph Medical Center, 350 NLRB 808 (2007), the Board indicated its adherence to that standard. The Board has noted that "Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *American Diamond Tool,* Inc., 306 NLRB 570 (1992) quoting *Chesapeake & Potomac Telephone Co. v, NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

In its brief, the Respondent first contends that the parties' collective-bargaining agreement gives the Respondent the right to make unilateral benefit changes. The contract in effect between the parties when the Respondent implemented the benefit plan changes explicitly provides in article 12 that the "Benefit Plans of the Company. …. shall not in any instance be or become part of this Agreement." Article 12 further provides that issues pertaining to said plans may be processed through the grievance procedure in article 2 of the contract but are not subject to arbitration. Thus, since the plans are specifically excluded from the collective-bargaining agreement there is clearly nothing in the collective-bargaining agreement, including the reservation of rights language included in the summary plan descriptions of the benefit plans, [11] that serves as a waiver of the Union's right to bargain over the changes in plan benefits. The Respondent also suggests that the fact that the Union did not file a grievance over the planned implementation of the changes in benefits supports its waiver defense. Certainly the fact that the Union did not file a grievance under article 2 of the contract is of no consequence since the Union demanded bargaining over the benefit plan changes on several occasions. The Respondent cannot dictate to the Union the manner in which it should challenge its planned benefit changes if the Union wishes to do so. I note, in this connection, the Board has held that an employer cannot dictate the manner in which a union requests bargaining over planned changes in a mandatory subject of bargaining. *Bell Atlantic Corp*., 332 NLRB 1592, 1595 (2000). Moreover, I note in passing that the Union's conduct is, in fact, consistent with article 2, section 5 which provides that if the Union desires to bargain over a matter which involves the interests of employees in more than one division, it shall bargain concerning said matter with the "refinery manager or their designee." The Union made four requests to bargain to Peterson after being informed of the planned benefit changes.

In further support of its waiver argument, the Respondent also relies on the reservation of rights language contained in the various benefit plans as it applies to the parties' 2003 MOA regarding employee benefits. The Respondent contends that the language of the 2003 MOA indicating that the agreement "does not alter the rights and obligations both Tesoro and PACE have under the Parties Collective Bargaining agreement and the Benefit Plans referred to herein." is a contractual waiver of the Union's right to demand bargaining over the benefit changes that the Respondent announced in July 2010. The Respondent also points to Montoya's statements at the May 2005 meeting regarding corporate wide benefit changes as supporting its position on waiver. As noted above, at that meeting Montoya stated that while he understood that the Respondent could make such changes, the Union did not agree with all of them.

[11] As I have noted above, the summary plan descriptions of the various employee benefit plans include the following or similar language "Tesoro expects and intends to continue the employee benefits described in this SPD indefinitely, but reserves the right to amend or discontinue any and all parts at any time."

In assessing the Respondent's arguments, I have carefully considered the Board's decision in *Amoco Chemical Co*. 328 N.L.R.B. 1220 (1999) enf. denied 217 F. 3d 869 (D.C. Cir. 2000), which involved an employer in the petroleum industry that unilaterally implemented changes to its medical benefit plans. There are substantial similarities between the *Amoco* case and the instant case. In that case the employer asserted its actions were privileged by reservation of rights language contained in the summary plan description of the Amoco Medical Plan (AMP). The Board noted that the summary plan description was not collectively bargained and that the four local contracts involved did not specifically incorporate the medical plan documents in the collective-bargaining agreements. There was no evidence that the parties had ever bargained about the reservation of rights language at the local or national level and there was only "scant evidence" that union officials were aware of the language. The Board noted that anecdotal evidence regarding two conversations between local management and union representatives fell short of establishing that the union had fully discussed and consciously explored the issue of waiving its right to bargain about changes in medical benefits. Id. at 1222, fn.6. In considering the evidence the Board noted that "waivers of statutory rights are not to be "lightly inferred." Id. at 1221 citing *Georgia Power Co.*, 325 NLRB 420 (1998), enfd. mem (176 F.3d 494 (11th Cir. 1999). [E]ither the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." Id. at 420–421. In *Amoco* the Board found that the evidence did not support the claim that the Union had clearly and unmistakably waived its right to bargain over the changes and therefore found that the employer violated Section 8(a)(5) and (1) of the Act. In so finding, the Board distinguished its decision in *Mary Thompson Hospital*, 296 NLRB 1245 (1989). In that case, the Board found that the employer did not violate Section 8(a)(5) and (1) of the Act when it made unilateral changes in its benefit plan where the collective bargaining agreement specifically incorporated the entire benefit plan, including the reservation of rights language, into the contract.

In the instant case, there is no specific language in the 2003 MOA itself regarding the Respondent's right to change the plans unilaterally. The MOA only states that it does not alter any rights and obligations the parties have under their collective-bargaining agreement and the benefit plans that are referred to by that agreement. The summary plan descriptions of the Respondent's benefit plans range from approximately 15 to 145 pages and the reservation of rights language is contained in various places in the individual agreements. As I have noted above, the summary plan descriptions are not collectively bargained documents. The reference in the MOA to the parties maintaining their rights under the collective-bargaining agreement and the benefit plans does not establish that, by executing the MOA, the Union clearly and unmistakably waived its right to bargain over future changes in the benefit plans. There is no evidence that the parties ever discussed the reservation of rights language contained in the benefit plans during the negotiations for the 2003 MOA. There is not even any evidence that union officials were aware of that language at the time.

Montoya's May 2005 statement that he understood the Respondent could make changes to the benefit plans does not establish that the Union had fully discussed and consciously yielded its right to bargain over changes in benefit plans in the future. In this connection, the record does not establish the basis for Montoya's statement or the specific nature of the changes made by the Respondent. I find that a single statement by one union representative in 2005 does not constitute

a clear and unmistakable waiver of the important statutory right of the Union to bargain over the instant changes to employee benefit plans.

Applying the principles expressed in *Amoco Chemical Co*[12]. supra and *Georgia Power Co.* supra, I find that the record does not support a finding that the parties' collective-bargaining agreement, the 2003 MOA or Montoya's 2005 statement establishes that the Union waived its statutory right to bargain over any planned changes to employee benefits. The reservation of rights language is contained only in the summary plan description of various benefit plans which are nonnegotiated documents. The collective-bargaining agreement explicitly excludes the benefit plans from the agreement. The oblique reference in the MOA to the retention of rights under the benefit plans is insufficient to find that the reservation of rights language contained in the benefit plans establishes that the Union clearly and unmistakably waived its right to bargain in the future over the mandatory subject of employee benefits.

The Respondent further argues that the bargaining history between the parties establishes that the Union has waived its right to now demand bargaining over the changes to the employee benefits. The Respondent also notes that in the 2009 negotiations between the parties, the International Union unsuccessfully proposed that "The company will provide fully paid medical, dental and vision coverage with no reduction in the benefits for the term of the agreement." (R. Exh. 12, paragraph 4.) The Respondent argues that the International Union's unachieved demand establishes that there is no restriction on the Respondent's right to make such revisions.

During negotiations in 1991 for a successor agreement with Amoco, OCAW, Local 610 proposed deleting article 12 of the then existing contract which excluded changes in benefit plans from being subject to arbitration (R. Exh. 50)[13]. The Union was unsuccessful in securing Amoco's agreement to its proposal. Also, during these negotiations the Union was unsuccessful in obtaining agreement with its proposal that there would be no reduction of health care benefits during the term of any agreement that was reached. On November 20, 2001, at a negotiating session between the Respondent and PACE, Local 7-10, the union proposed deleting the language from article 12 which excluded grievances over benefit plans from arbitration (R. Exh. 40). When the Respondent did not agree to its proposal, the union then proposed deleting the language that excluded benefit plans from being part of the collective-bargaining agreement. The revised union proposal kept the existing contract language that permitted grievances to be filed over changes to benefit plans and continued the exclusion of such grievances from arbitration. (R. Exh. 13). The union was also unable to achieve this revision to the collective-bargaining agreement.

[12] While *Amoco Chemical Corp*. was not enforced in *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000), I am bound to apply Board precedent unless and until it is reversed by the Supreme Court. *Waco Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F. 2d 176 (8th. Cir. 1964). I note, moreover, that in *Provena Hospital*, 330 NLRB 808 (2007) the Board indicated its adherence to the clear and unmistakable waiver standard, explaining in detail why it did not agree with the "contract coverage" approach enunciated by the D.C. Cir. in *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1994) and applied by the court in *BP Amoco Corp*., supra.

[13] The language of article 12 remains unchanged to the present time.

During the negotiations for the 2009–2012 agreement the International Union proposed at the national bargaining that the employers, including the Respondent, provide fully paid medical benefits and that there be no reduction in benefits during the term of the agreement (R. Exh. 12). The Union was unable to secure such language in the collective-bargaining agreement.

The Respondent contends that this bargaining history is consistent with the parties understanding that the Respondent may unilaterally make benefit changes. The Respondent also argues that the Union has failed to achieve from bargaining limitations on the Respondent's unilateral right to make changes in benefit plans and is attempting to secure such a limitation through this case and that such an attempt is contrary to Board policy. In support of this argument, the Respondent relies on *Ace Beverage Distribution Co*., 253 NLRB 951, 952 (1980). In *Ace Beverage*, the Board found that the employer did not violate Section 8(a)(3) and (1) of the Act by denying certain reinstated strikers pro rata vacation for the time worked prior to the strike, since these employees were not entitled to such a benefit under the terms of the collective-bargaining agreement. The vacation benefit provision of the contract required employees to work 45 weeks a year in order to earn any vacation benefits. Because of the strike, the reinstated strikers did not work the 45 weeks necessary to obtain this benefit. The contract expressly limited a pro rata share of vacation benefits to employees who quit, retired, or surrendered their seniority. Thus, the reinstated strikers were not eligible for pro rata vacation benefit, pursuant to the terms of the collective-bargaining agreement. The Board noted that during the most recent negotiations the union sought to amend the vacation benefit provision to provide pro rata benefits for all employees, but was unsuccessful. Under these circumstances, the Board found that to find an 8(a)(3) and (1) violation through the manner in which the employer applied the contract provision would give the union through the unfair labor practice proceeding what it could not achieve during negotiations.

I find the instant case to be clearly distinguishable from the circumstances present in *Ace Beverage*. There, the Board was required to analyze the language and history of the collective-bargaining provision when the issue was whether the employer violated Section 8(a) (3) and (1) in the manner in which that provision was applied. In the instant case, the issue is whether the Respondent has an obligation to bargain over changes in employee benefits when the benefit plans are explicitly excluded from the contract. Clearly, the bargaining history of the Union and its predecessors does not establish that the Union has clearly and unmistakably waived its right to bargain over this important mandatory subject of bargaining.

I find the Respondent's reliance on *Ball Corp*., 322 NLRB 948 (1997) to be similarly misplaced. There, the complaint alleged the employer failed to bargain with representatives designated by the union in violation of Section 8(a) (5) and (1). In deciding the issue, the Board found it necessary to consider the relevant contract provisions regarding the composition of the union's bargaining committee. Here, as previously noted, the benefit plans are explicitly excluded from the agreement and there is no contract language in the collective-bargaining agreement or the 2003 MOA which specifically addresses the Respondent's right to make benefit changes.

I also find no merit to the Respondent's related argument that OCAW's unsuccessful litigation in a suit brought in 1994 under Section 301 of the LRMDA and ERISA challenging Amoco's right to change health care benefits in the Amoco Medical Plan (AMP) supports its

position that the Respondent is privileged to unilaterally implement the current employee benefit plan changes. In granting Amoco's motion for summary judgment, the district court specifically noted that the AMP was excluded from being governed by the terms of the collective-bargaining agreement and thus Amoco's unilateral action in changing the plan did not constitute a violation of the contract and therefore did not violate Section 301 of the Act. (R. Exh. 44, pgs. 6–10).

As noted above, the language of article 12 of the contract is unchanged since the time of the Amoco litigation. As I have noted above, article 12 specifically excludes the employee benefit plans from the collective-bargaining agreement. The court's decision is premised upon the specific exclusion of the AMP from the contract. A decision by a district court that Amoco did not commit a contract violation under Section 301 in 1994 does not, in any way, establish that there is no underlying obligation to bargain over a mandatory subject bargaining that is not included in a collective-bargaining agreement. By its express terms Section 301 confers jurisdiction on the federal courts to determine "suits for violations of contracts between an employer and a labor organization". Since the parties' contract specifically excludes the benefit plans, determining whether a unilateral change in those plans constitutes an unfair labor practice is within the exclusive jurisdiction of the Board. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Kaiser Steel Corp., v. Mullins*, 455 U.S. 72, 83 (1982) [14]

In further support of its contention that the Union has waived its right to bargain over the benefit plan changes implemented on January 1, 2011, the Respondent relies on the fact that the Union did not demand bargaining over previous changes that were made unilaterally to various benefit plans. The record contains several examples of the Respondent's institution of changes in benefits prior to the ones that are the subject of the instant dispute. On March 7, 2007, the Respondent notified the Union that the insurance carrier was changed from Met Life to CIGNA; that the maximum disability benefit was increased from $10,000 to $15,000 a month and that the definition of disability was changed from an inability to perform the duties of an employee's occupation in the local economy to the inability to perform those duties in the national economy (R. Exh. 28). On April 4, 2007, the Respondent advised the Union that effective April 1, 2007, some beneficial changes had been made to employee benefit plans. In this connection, the lifetime benefits under the Respondent's self-insured medical plan (Aetna PPO) were increased from $2 million to $5 million. In addition, under the Respondent's Aetna plan qualified

[14] At the hearing the Respondent sought to admit into evidence an unfair labor practice charge filed in September 1993 by OCAW against Amoco alleging that Amoco violated Section 8(a)(5) and (1) by making changes to medical care benefits at the Mandan facility. (R. Exh 52). According to the representation of the Respondent's counsel, this charge was withdrawn. I rejected the exhibit as I determined a charge filed in 1993 regarding this issue had no probative value. In its brief, the Respondent requests me to reconsider my ruling regarding R. Exh.52 and admit it into evidence. The Respondent contends that the charge "is relevant to the parties comprehension of the company's authority; and that, against such a backdrop, the Union has been unable to change the applicable CBA language." (Respondent's brief, p. 11, fn.12). I adhere to my ruling excluding R. Exh.52. The fact that a predecessor union filed a charge similar to the instant one in 1993 that was withdrawn has no bearing on this proceeding. In *Ball Corp*., 322 NLRB 948, 951 (1997) the Board noted "It is settled law that a Regional Director's administrative dismissal or refusal to proceed on a charge is not an adjudication on the merits and does not preclude future litigation of the subject matter of that charge." (Citations omitted.)

dependent children would be covered up to age 25 regardless of student status; and beneficial changes were made in the ability of a retiree's dependents to continue medical coverage if the retiree died (R. Exh. 29). At a meeting held on April 27, 2007, the Union noted that some of the changes the Respondent had instituted were substantial and requested that employees be allowed to change medical plans immediately rather than waiting for the annual open enrollment period.

At the union-management meeting held on July 12, 2007, the Respondent's local managers at the Mandan facility informed the Union that they had advised individuals at the Respondent's headquarters about the Union's request that employees be allowed to change medical plans immediately if they wish to do so. The Union was informed that the Respondent was not going to open enrollment until the regular annual enrollment period. At this meeting the Respondent also informed the Union that the new vacation policy would be applied to employees corporate-wide, including those who were represented by a union. The major changes in the vacation policy were that the maximum amount of accumulated vacation was revised to twice that of the annual vacation amount and vacation would no longer accumulate during the year but would be granted each January 1 (R. Exh 30). The examples noted above are representative of changes the Respondent made to benefit plans prior to those announced in July 2010. There are other examples contained in the record.

I note initially that several of the changes set forth above are beneficial to unit employees, thus there would be little incentive for the Union to request bargaining over such changes. More importantly, however, the failure of the Union and its predecessors to object to prior changes in employee benefits does not establish that the Union has waived its right to bargain over the instant changes to the employee benefit plans. The Board's established policy is that the fact that a union has not demanded bargaining over changes in bargainable matters in the past does not establish a waiver of the right to bargain over future changes an employer wishes to make, even where those changes are similar to those made by the employer in the past without objection. *Amoco Chem. Co.*, supra, at 1222, fn. 6; *Georgia Power Co*., 325 NLRB 420, 421 (1998); *Bath Iron Works Corp*., 302 NLRB 898, 900–901 (1991); *Johnson-Bateman Co*., 298 NLRB 180, 187–188 (1989).

I do not agree with the Respondent that the Board's decision in *Mt. Clemens General Hospital*, 344 NLRB 450, 460 (2005) supports its position regarding waiver. In the first instance, in *Mt. Clemens* the Board indicated that the only exceptions before it were the General Counsel's exception to the administrative law judge's order and notice regarding an information request. Id. at p. 450, fn. 2. It is clear therefore that no exceptions were filed to the administrative law judge's finding that the employer did not violate Section 8(a) (5) and (1) by making changes in its pension plan. Id. at 459–460. It is settled Board policy that review of an administrative law judge's decision is limited to the issues raised by exceptions and that, in the absence of exceptions; the Board does not pass on an administrative law judge's rationale. *FES*, 333 NLRB 66 (2001). Accordingly, I do not consider the portion of the Board's decision in *Mt. Clemens* relied on by the Respondent to be binding precedent. I note, moreover, that in *Mt. Clemens* there was specific contract language supporting the administrative law judge's conclusion that the union waived its right to bargain over changes to the pension program. Thus, the case is also distinguishable on its facts.

Whether the Union's Bargaining Posture Constitutes a Waiver

The Respondent contends that if there was an obligation to bargain over the employee benefit changes instituted on January 1, 2011, it gave the Union an opportunity to bargain regarding its proposed changes, and that the Union waived its right to bargain over the changes through inaction.

The Acting General Counsel and the Charging Party argue that the Union demanded to bargain in a timely manner and also timely requested information relevant to the issues to be bargained. According to the Acting General Counsel and the Charging Party, after the Respondent furnished the information, it implemented its proposal without giving the Union a reasonable period of time in which to make a proposal.

As noted above, on July 26, 2010, Peterson called Montoya and informed him that the Respondent would be making benefit changes at the Mandan facility. On July 28, 2010, the Respondent's CEO sent an email to all employees informing them that the Respondent would implement changes to benefit plans on January 1, 2011. On July 29, 2010, Peterson gave the Union a letter containing a summary of the changes that the Respondent planned to institute. On the same day Montoya told Peterson that Respondent needed to negotiate the benefit changes with the Union, but Peterson responded that the Respondent had no obligation to bargain regarding this matter in accordance with article 12 of the parties' collective-bargaining agreement.

On August 5, 2010, the Union submitted a written demand for negotiations over the benefit changes. On August 18, Peterson submitted a letter to the Union acknowledging its request for bargaining. In his letter, Peterson maintained that the Respondent's proposed changes were consistent with its rights to make such changes under the plans as contemplated by the collective-bargaining agreement. The letter also indicated that, without prejudice to its contractual right to implement such changes, the Respondent was "willing to discuss the benefit changes".[15]

On August 20, 2010, the Union submitted an information request to the Respondent seeking a substantial amount of information regarding the comparative costs of the existing plans and the Respondent's proposed changes. The Union specifically indicated it was seeking this information in order to bargain on behalf of its members regarding the Respondent's proposed changes. The Union requested that the information be provided by October 1, 2010. On September 9, 2010, the Union submitted a second request for information, seeking copies of the plan descriptions for both the current plans and the proposed plans. The Union also asked that this information be submitted by October 1.[16]

[15] At the meeting held between the Respondent and the Union on September 1, 2010, before the power point presentation was given to employees about the upcoming benefit changes, Montoya again requested bargaining over the proposed changes. On October 22, 2010, the Union again requested bargaining over the proposed changes in an email sent to Peterson.

[16] Since the information sought by the Union involved the wages, insurance and pension benefits of the unit employees it is presumptively relevant and the Respondent was obligated to furnish it on request. *Honda of Hayward*, 314 NLRB 443 (1994); *Crane Co*., 244 NLRB 103, 111 (1979).

Pursuant to the Union's September 9 information request, on September 30 the Respondent provided approximately 22 summary plan descriptions to the Union totaling approximately 1100 pages. (GC Exh. 24.) In October 2010, the Respondent presented the Union with a confidentiality agreement regarding the cost data that the Union had requested on August 20. The parties negotiated regarding the terms of the confidentiality agreement into December 2010. On December 14, 2010, the parties executed a confidentiality agreement regarding the cost data related to the proposed change in benefit plans. On December 15, 2010, Peterson furnished the Union with the cost data it was seeking and the Union submitted that information to the International Union's benefit expert the next day. In the same letter Peterson indicated that, without compromising any of its rights under the collective-bargaining agreement, the Respondent was willing to consider any proposal regarding benefits the Union wanted to make. However, during the payroll period beginning on December 19, 2010, the Respondent implemented its proposed change in the 401(k) thrift plan by reducing its matching contribution from 7 percent to 6 percent. The Respondent implemented the remainder of its proposed changes to the benefit plans on January 1, 2011, consistent with its declaration at the outset of this process.

I do not agree with the Respondent's position that the Union's conduct after being informed of the Respondent's intention to implement benefit changes constitutes a waiver of its right to bargain and privileged the Respondent's implementation of the changes to its benefit plans beginning on or about December 19, 2010. On July 29, 2010, when the Union was first given a summary of the benefit changes the Respondent intended to make, Montoya informed Peterson that the Respondent needed to negotiate the benefit changes with the Union. On August 5, the Union sent a letter to Peterson demanding bargaining regarding the benefit changes for the employees in the Mandan unit. The letter also advised the Respondent that the Union would be submitting a written request for information regarding the benefit changes. Finally, the Union's letter indicated it wished to schedule meetings to bargain over the changes following the Respondent's submission of the requested information. Consistent with the Union's August 5 letter, on August 20 and September 9, it submitted the above noted requests for information. The Respondent supplied the summary plan descriptions on September 30. However, because of the Respondent's desire for a confidentiality agreement, it entered into negotiations with the Union regarding such an agreement that were not completed until December 14, 2010. Accordingly, the information regarding the cost of the plan was not supplied by the Respondent until December 15 and the Union immediately submitted the information to the International Union's benefit expert who was assisting it in the negotiations.

The Union had indicated on August 5 that it would bargain over the changes after the Respondent provided it with the requested information. On December 15, 2010, in a letter to Peterson, Montoya asked when the Respondent would provide the outstanding cost information and reiterated that the Union would provide the Respondent with proposed dates for bargaining after it had an opportunity review the information.

By implementing the reduced 401(k) contribution level during the payroll period beginning on December 19, 2010, and by implementing the remainder of the benefit changes on January 1, 2011, the Respondent foreclosed the possibility of meaningful bargaining. The Union did not have a sufficient opportunity to review the relevant cost information it received in order

to assist it in making a proposal prior to the Respondent's implementation of its proposed changes.

The Board has held that an employer's failure to give a union an adequate opportunity to review relevant information prior to implementing a proposal supports a finding that the employer's action violates Section 8(a)(5) and (1) of the Act. *Decker Coal Co*., 301 NLRB 729, 740 (1991); *Royal Motor Sales*, 329 NLRB 760, 763 fn. 14 (1999). I find that these cases support my conclusion that the Respondent did not give the Union an adequate opportunity to bargain after receiving relevant and necessary information. The Respondent makes much of the fact that the Union did not make a proposal before the Respondent began to implement its proposed changes regarding the benefit plans. Without an adequate opportunity to review the cost information, however, the Union cannot be faulted for not making a proposal, as it did not have the underlying information regarding the relative costs of the planned changes compared to the existing plans. On four occasions the Union asserted its right to bargain regarding these changes and on two occasions indicated it would make a proposal after it had reviewed the requested information.

It was not until December 13, 2010, when Peterson indicated that the Respondent was "willing to consider any proposals the Union offers" that it Respondent clearly indicated it would bargain over the changes it indicated it would make to the benefit plans.[17] As late as December 6, 2010, when the Union asked whether the Respondent would negotiate the proposed changes with it, the Respondent replied that it was "prepared to follow article 12 of the agreement, including the procedures of article 2, sections 1–7 referenced therein. Article 2 of the agreement provides a grievance could be filed regarding benefit changes but that such issues could not be arbitrated. As I noted earlier, such a statement establishes that the Respondent was attempting to dictate to the Union the manner in which it should challenge the Respondent's position on the benefit changes if it wished to do so. The Union had made several demands to bargain by this time which the Respondent was obligated to respond to. As of this late date, however, the Respondent was still sending an equivocal message regarding whether it would engage in meaningful bargaining with the Union over the proposed changes. Then, after finally indicating it would bargain on December 13, 2010, and providing the outstanding relevant cost information on December 15, 2010, the Respondent almost immediately began to implement the changes. Such conduct is incompatible with the statutory duty to bargain in good faith over mandatory subjects of bargaining.

I find the cases relied on by the Respondent in support of its position that the Union through inaction has waived its right to bargain over the proposed changes to be distinguishable. In *Vandalia Air Freight, Inc*., 297 NLRB 1012 (1990) the employer's president, Kauffman met with the union's president Sasser on July 16, 1985, and informed him that the employer was in

[17] I do not find the fact that the Respondent delayed implementation of its vacation policy for 1 year after the Union raised objections to it at the September 1, 2010 meeting between the parties supports the Respondent's position that it had always been willing to engage in good-faith bargaining with the Union since its initial July 2010 notice that it would institute such changes. There is no evidence the Union agreed to the Respondent's action in delaying implementation of a change in the vacation policy for 1 year. Thus, the Respondent's unilateral decision regarding this matter does not establish that it was engaged in good-faith bargaining over the entire range of benefit changes it proposed to institute.

dire financial straits. Kauffman showed Sasser the employer's profit and loss statement. Kauffman asked Sasser if he had any suggestions for ways that the employer could overcome the financial difficulties and Sasser offered no ideas. Kaufman informed Sasser that bankruptcy was one option but that alternatively the parent company was considering the possibility of having another company (CPS) take over the employer's operation. When Sasser asked what would happen with the drivers the union represented, Kauffman indicated that CPS used owner-operators and that all the unit employees would have the opportunity to become owner operators. When Sasser asked if the employer could operate at the status quo, Kauffman again asked Sasser if he had any ideas on how to accomplish that in light of the financial circumstances. Sasser again replied he had no suggestions. Kauffman then gave Sasser a letter that he wished to give to the drivers the next day indicating that CPS would take over the operation. After reviewing the letter, Sasser said there was no sense in meeting with the union committee. He asked if Kauffman could meet with the drivers instead. On July 21, Kauffman met with the drivers. At that time Sasser told Kauffman that the drivers had agreed to extend the contract for 1 year. Kaufman explained that the decision to contract with CPS had been made. On July 27 the union's attorney requested information and requested bargaining over the takeover decision and its effects. The Board noted that despite being confronted with the urgency of the situation, the union failed to request information or bargaining for more than 10 days. The Board found that the union failed to apprise the employer of its desire to negotiate in a timely manner and had waived its right to bargain. Accordingly, the Board found that the employer did not violate Section 8(a) (5) and (1).

In the instant case, the Union immediately requested bargaining when it was informed of the Respondent's intention to institute changes in the benefit plans. The Union also requested relevant information in a timely manner. Despite the Union's repeated assertions that it wished to bargain after it had an opportunity review the information, the Respondent prematurely implemented its proposed changes on the date that it had initially indicated it would. Moreover, unlike the situation in *Vandalia Air Freight,* there is no indication in this case that there was any economic exigency that made the Respondent's implementation of its proposal on or about January 1, 2011, necessary.

In *Bottom Line Enterprises*, 302 NLRB 373 (1991) the Board reiterated its long-standing rule that an employer cannot implement a unilateral change regarding a mandatory subject of bargaining, absent a valid impasse. The Board further indicated that there were two limited exceptions to the rule: when union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. Id at 374.[18] Neither factor is present in this case.

I also do not agree with the Respondent that the Board's decision in *Jim Walter Resources, Inc*., 289 NLRB 1441 (1988), is supportive of its position. In that case the employer clearly informed the union that it would not be paying insurance premiums during an upcoming strike for employees receiving disability payments. The union, however, never requested bargaining regarding this matter. Under these circumstances, the Board found that the union's inaction amounted to a waiver of its right to bargain and therefore the employer did not Section

[18] In *RBE Electronics of South Dakota, Inc.,* 320 N.L.R.B. 80, 81 (1995) the Board noted that the economic exigency exception involves "circumstances which require implementation at the time the action was taken or an economic business emergency that requires prompt action." (Citations omitted).

8(a) (5) and (1). Here, the Union made four specific demands to bargain and requested relevant information that was not provided to the Union until shortly before the employer implemented its proposal. These two salient differences serve to distinguish this case from *Jim Walter Resources*.

I also find unpersuasive the Respondent's argument that Local 10 did not have sufficient authority to enter into an agreement with the Respondent and that this lack of authority made good faith negotiations over the benefit changes impossible. The most recent contract between the parties that expired by its terms on January 31, 2012, indicates that Local 10 is the bargaining representative. Historically, the bargaining that occurs in the petroleum refining industry occurs both at the national level by the International Union and at the local level by various local unions. Since the Respondent indicated in July 2010 that it would implement sweeping changes to its benefit plans on a national level, it is hardly surprising that Local 10 would wish to coordinate its bargaining with the International Union and also to utilize the expertise of the International Union's benefit expert. As discussed in detail above, it was the Respondent's implementation of its changes to the benefit plans immediately after it provided cost data to the Union which precluded any meaningful bargaining and not any action on behalf of Local 10 or the International Union.

Based on the foregoing, I find that the Respondent violated Section 8 (a)(5) and (1) by failing to bargain in good faith with the Union regarding the changes to its employee benefit plans in the Mandan unit and by its unilateral implementation of the changes to the plans commencing on or about December 19, 2010.

CONCLUSIONS OF LAW

1. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 (the Union) is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

   > All operating and maintenance employees employed by the refining & engineering department of the Tesoro Refining and Marketing Co. at its Mandan, North Dakota refinery excluding all clerical, confidential and professional employees, watchmen and guards, employees of the Tesoro pipeline and supervisors, as defined in the Act.

2. By failing to bargain in good faith with the Union regarding changes to its employee benefit plans, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By commencing to unilaterally implement changes to its benefit plans on or about December 19, 2010, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I order the Respondent to restore the employee benefits that were provided to employees before the benefit plans were unilaterally modified. In addition, the Respondent shall reimburse unit employees for any expenses resulting from the unilateral changes, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6 Cir. (1971)), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Tesoro Refining and Marketing Co. Mandan, North Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union regarding employee benefit plans

(b) Implementing changes to employee benefit plans without bargaining with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union regarding employee benefit plans for the employees in the following appropriate unit:

> All operating and maintenance employees employed by the refining & engineering department of the Tesoro Refining and Marketing. Co. at its Mandan, North Dakota refinery excluding all clerical, confidential and professional employees, watchmen and guards, employees of the Tesoro pipeline and supervisors, as defined in the Act

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) On request of the Union, rescind the unilateral changes to the employee benefit plans it began to institute on or about December 19, 2010, and restore the benefits furnished under the employee benefit plans before the changes were instituted.

(c) Make employees whole for all increased costs to them as a result of the unilateral changes in employee benefit plans, including the costs of insurance premiums and the expenses incurred as a result of the changes in the plans, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay or costs due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Mandan, North Dakota copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 7, 2012.

_____
Mark Carissimi
Administrative Law Judge

20 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 (the Union) regarding employee benefit plans.

WE WILL NOT implement changes to employee benefit plans without bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union regarding employee benefit plans for the employees in the following appropriate unit:

All operating and maintenance employees employed by the refining & engineering departments of the Tesoro Refining and Marketing Co. at our Mandan, North Dakota refinery excluding all clerical, confidential and professional employees, watchmen and guards, employees of the Tesoro pipeline and supervisors as defined in the Act.

WE WILL, on request of the Union, rescind the unilateral changes to the employee benefit plans we began to institute on or about December 19, 2010, and restore the benefits furnished under the employee benefit plans before those changes were instituted.

WE WILL make employees whole for any increased costs to them as a result of the unilateral changes instituted in employee benefit plans, including the cost of insurance premiums and the expenses occurred as a result of the changes in the plans, with interest.

TESORO REFINING AND MARKETING CO.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221

(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.